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PRIVILEGED COMMUNICATIONS IN JUDICIAL PROCEEDINGS.

I.

A careful review of the cases, both English and American, from the year 1500 to the present date, relative to communications in judicial proceedings that are privileged, and, therefore, not actionable for any slanderous or libelous statements therein, reveals the fact that there has, during this time, been more or less litigation over such statements. It is but natural that a person slandered should seek some redress, and the average citizen does not readily distinguish between a slanderous statement uttered in a judicial proceeding and one uttered *in pais*.

The wavering of courts upon this important matter has caused much uncertainty in the law of the subject. Among the decisions there is no harmony. Even in the same jurisdiction cases can be found supporting either the absolute or the qualified privilege; and in one jurisdiction it is held that the same rule does not apply to counsel and witness; while all courts hold the judge absolutely privileged. The true cause of this lack of harmony it is difficult to find. Whether it be in the misinterpretation or misapplication of precedent, or a diversity of opinion as to the reason to be applied, is a matter we shall discuss in its proper place. For the present, we shall confine ourselves to a brief summary of the leading English and American cases touching privileged communications, with reference to *Judges, Parties, Counsel* and *Witnesses*, and statements concerning *Persons not before Court*.

We shall not attempt to review or cite all the cases bearing on the subject, nor to discuss that broad class of cases of qualified privilege, such as confidential communications, State secrets, etc.; nor statements made in the discharge of a public or private duty, as statements of a master in giving the character of a servant, or publications made in the ordinary mode of parliamentary proceedings. This class of cases, while perhaps analogous to the absolutely privileged class,

cannot properly be relied on as precedent for the doctrine supporting the absolute privilege—though this has not infrequently been done. By the confusing of authorities in this manner an uncertain principle of law has often been established. It may be that this practice has had something to do with the establishing of the present American doctrine, namely, that *communications in judicial proceedings, to be privileged, must be relevant and pertinent to the issue.*

II.

STATEMENTS OF JUDGES.

The decisions with reference to the communications of judges are in almost complete harmony. It is held that a judge, while acting in a judicial capacity, is absolutely privileged in whatever he may say, even though his statements be malicious, false, unjustifiable, totally irrelevant and without justification or excuse. In fact, a judge is absolutely free to utter what he pleases while acting in his judicial capacity, and this rule seems to apply to every judicial officer, from that of the magistrate to the judge of the highest court in the land.

Judges and magistrates of the following courts have been held to be privileged: Superior court;¹ county court;² coroner's court;³ magistrate's court;⁴ criminal court;⁵ chancery court;⁶ common pleas;⁷ probate court;⁸ and constable.⁹

Upon this branch of the subject the authorities are conceded to be uniform, with the exception of the case of *Kendillon v. Maltby*,¹⁰ which was an inferior court decision; the opinion upon the point in question is *obiter*, and is disapproved in *Munster v. Lamb*.¹¹

STATEMENTS IN AFFIDAVITS AND PLEADINGS.

In the case of *Lord Beauchamps v. Sir R. Croft*,¹² the English rule was laid down as follows:

"Every affidavit sworn to in the course of a judicial proceeding before a court of competent jurisdiction is absolutely privileged, and no action lies therefor, however false and malicious may be the statements made therein."

¹ *Fray v. Blackburn*, 3 B. & S. 576 (1863).

² *Floyd v. Barker*, 12 Rep. 23 (1808); *Scott v. Stansfield*, L. R. 3 Ex. 220 (1868).

³ *Thomas v. Churton*, 2 B. & S. 475 (1862).

⁴ *Rez v. Skinner*, Loft, 55 (1772); *Pratt v. Gardner*, 2 Cush. 63 (1848).

⁵ *Bradley v. Fisher*, 13 Wall. 335.

⁶ *Yates v. Lansting*, 9 Johns. 395 (1812); also 5 Johns. 282.

⁷ *Childs v. Voris*, 4 Ohio (N. P.), 67 (1897).

⁸ *Phelps v. Sill*, 1 Day's Cases in Error (Conn.), 315 (1804).

⁹ *Andreas v. Nott Bower*, 1 Q. B. L. R. 838 (1895).

¹⁰ 1 Car. & M. 409 (1842).

¹¹ 11 Q. B. D. 608 (1883).

¹² *Dyer*, 285a. (1569).

To this rule most of the subsequent English cases have adhered without any qualifications whatever.¹

In the case of *Henderson v. Broomhead*² there was by a part of the court a qualification of the above rule to the extent that the statement must be *relevant to the matter in issue*. Erle, J., uses this expression, but places little stress upon the point. Crompton, J., holds very explicitly that the relevancy or irrelevancy cannot be considered. But for this statement of Erle, J., the case is in perfect harmony with all the other cases.

A few American courts follow the English rule;³ but by far the greater number hold, that the matter to be privileged must be pertinent and relevant to the issue.⁴

Under this same general division may be classed another branch of the American cases, holding that statements made in a judicial proceeding by witness, counsel or party, concerning one *not a party* to such proceedings, and not before court either as witness or party, are not privileged, unless pertinent and relevant to the issue.⁵ To this latter rule there is one American authority to the contrary—a decision of much ability, covering the entire field of privileged communications in judicial proceedings.⁶ The English case of *Henderson v. Broomhead*, *supra*, is also contrary to the American rule in this particular.

STATEMENTS OF COUNSEL.

In England all counsel are absolutely privileged in whatever they may utter in judicial proceedings; and whether or not the matter be pertinent and relevant to the issue, cannot be a subject of enquiry. This is settled beyond question in *Munster v. Lamb*,⁷ the latest and perhaps the best authority on the subject. The opinion presents a forcible argument for the absolute privilege, reviewing the authorities from *Lord Beauchamps v. Sir R. Croft*, *supra*, to the time of *Daw-*

¹ *Astley v. Young*, 2 Burr. 268 (1759); *Lake v. King*, 1 Saunders, 120 (1667); *Revis v. Smith*, 18 C. B. 126 (1856); *Rez v. Skinner*, Loft, 55 (1772).

² 4 H. & N. 569 (1859).

³ *Vausee v. Lee*, 1 Hill (So. Car. Law), 197 (1832); *Harstock v. Reddick*, 6 Blackf. (Ind.), 258 (1842); *Strauss v. Meyer*, 48 Ill. 385 (1868); *Runge v. Franklin*, 72 Tex. 585; *Bartlett v. Christhilf*, 69 Md. 219 (1888).

⁴ *Hart v. Baxter*, 47 Mich. 198 (1881); *Hyde v. McCabe*, 100 Mo. 412 (1890); *Ash v. Zwietsch*, 159 Ill. 455 (1896); *Sherwood v. Powell*, 61 Minn. 479 (1895); *McLaughlin v. Cowley*, 127 Mass. 316 (1877); *Gar v. Selden*, 4 Comst. 91.

⁵ *Union Mutual Life Ins. Co. v. Thomas*, 83 Fed. 803 (1898); *Moore v. Bank*, 123 N. Y. 420 (1890); *Ruohs v. Backer's Next Friend*, 6 Heisk. (Tenn.) 406 (1871).

⁶ *Johnson v. Brown*, 13 W. Va. 71 (1878).

⁷ 11 Q. B. D. 588 (1883).

kins v. Lord Rokeby.¹ There are English cases containing *dicta* to the effect that if the words uttered were not pertinent and relevant, counsel "*might*" be held responsible, not as for slander, but "in an action on the case for words spoken maliciously and without reasonable or probable cause." Such was the *dictum* by Holroyd, J., in *Flint v. Pike*;² but the statement is in conflict with the entire case and the result reached. It is in harmony, however, with a *dictum* by the same judge in *Hodgson v. Scarlett*.³ But these *dicta*, while followed to a considerable extent in America, have been approved in England only extrajudicially, as in *Mackey v. Ford*⁴ and *Needham v. Dowling*.⁵ The absolute privilege is upheld in these two cases, with an intimation that the matter "ought to be pertinent and relevant," and that the court might decide otherwise were such not the case.

The case of *Hodgson v. Scarlett*, which was for a short time a disturbing element in the English law, and has always been such in the American courts, where it was doubtless the foundation for the present adverse rule, is now, since the decision of *Munster v. Lamb*, *supra*, absolutely shorn of all its weight, if it ever had such in England.

The *dictum*, never having received recognition in England, should never have been received as a precedent in this country, not only because it was *obiter*, but for the further reason that the author of it repudiates it in a note appended to the reported decision.⁶ The American doctrine is expressed in the following cases: *Gilbert v. People*,⁷ *Maulsby v. Reifsnider*,⁸ *Shelfer v. Gooding*,⁹ and *Hastings v. Lusk*.¹⁰

STATEMENTS OF WITNESSES.

In *Seaman v. Netherclift*¹¹ the English rule is stated by Chief Justice Cockburn, as follows:

"If there is anything as to which the authority is overwhelming, it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy of what he says, for then he would be obliged to judge of what is relevant or irrelevant; and questions might be and are constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extended to witnesses is established by a long series of cases, the last of which is *Dawkins v. Lord Rokeby*, after which to contend to the contrary is hopeless."

¹ 8 Q. B. D. 263 (1873).

² 4 B. & C. 478, 481 (1825).

³ 1 Barn. & Ald. 213 (1818).

⁴ 5 H. & N. 792 (1860).

⁵ 15 L. J. (C. P.) 9.

⁶ See statement of Alderson, B., in *Gibbs v. Pike*, 9 M. & W. 358; *Revis v. Smith*, 18 C. B. 140.

⁷ 1 Denio, 41 (1845).

⁸ 69 Md. 143 (1888).

⁹ 2 Jones (N. C. Law), 175 (1855).

¹⁰ 22 Wend. 410 (1839).

¹¹ 2 C. P. D. 56 (1876).

So, in *Revis v. Smith*, *supra*, it was held that though statements be made "falsely, maliciously and without any reasonable or probable cause," they are, nevertheless, privileged.

The doctrine on this point in America is in much conflict. The authorities supporting the English rule are *Hunkell v. Voneiff*,¹ *Goslin v. Cannon*,² and *Terry v. Fellows*;³ while the contrary doctrine is expressed in *Shaddee v. McElwee*,⁴ *Rice v. Coolidge*,⁵ *Acree v. Starkweather*,⁶ *McLaughey v. Wetmore*,⁷ and *Mower v. Watson*.⁸

The following American cases support the new doctrine, and as they are of much weight as authority (though it is impossible to classify them) we mention them for future reference: *White v. Nichols*,⁹ *Hoar v. Wood*,¹⁰ *Ring v. Wheeler*,¹¹ and *Torrey v. Field*.¹²

III.

It has not been our object to include in the above list of authorities all cases decided upon the matter in question, but only such cases as seem to be recognized authorities, aiming to cover every branch of the subject of importance.

Generally speaking, the law of privileged communications in judicial proceedings is the same with reference to witnesses, counsel and parties. That is, the same principle of law governs each, except in Maryland, where the rule differs as between counsel and witnesses, the latter being *absolutely privileged*, while the former must utter only that which is *pertinent and relevant*. This distinction was established in two decisions rendered at the same term of the court. The opinion in the case of *Hunkel v. Voneiff*,¹³ decided last, presents some excellent arguments in favor of the proposition that a witness should have a greater privilege than counsel, of whom it was decided in *Maulsby v. Reifsneider*¹⁴ that all statements to be privileged must be pertinent.

The above exception is the only instance in which there has been an effort to draw a distinction between counsel, witnesses and parties, either in America or England, while, as said before, judges are all privileged.

IV.

This brings us to a more minute consideration of the leading American cases supporting the new doctrine and of those American cases ad-

¹ 69 Md. 179 (1888).

² 1 Harrington, 3 (1832).

³ 21 La. Ann. 375.

⁴ 86 Tenn. 146 (1887).

⁵ 121 Mass. 393 (1876).

⁶ 76 N. W. Rep. 378 (Mich. 1898).

⁷ 6 Johns. 82 (1810).

⁸ 11 Vt. 536 (1839).

⁹ 3 Howard, 266, 288 (1845).

¹⁰ 3 Met. 193 (1841).

¹¹ 7 Cow. 725 (1827).

¹² 10 Vt. 353 (1838).

¹³ 69 Md. 179.

¹⁴ 69 Md. 143 (1888).

hering to the English rule. It will not be necessary to discuss the leading English cases except as they may be cited as authority for the American doctrine. In the case of *McLaughlin v. Cowley*,¹ it is stated that the English rule is well settled, and that it is contrary to the American rule; and, again, in *Union Mutual Life Ins. Co v. Thomas*,² Gilbert, J., says: "Contrary to the rule of English courts, the American courts have established a doctrine that matter inserted in a pleading in court is privileged only when connected with the subject-matter of the litigation." Both of the above cases are of recent date, and it is conceded by these and other cases that the new doctrine is one that is in entire opposition to the English law. Strange to say, this idea is of recent growth, for, in the early American cases, where lies the true foundation for the American doctrine, it was insisted that the English law was otherwise than it is now admitted to be. A few of the American cases still make a strained effort to show that English law lays a foundation for the new rule, but their effort is futile in the face of *Munster v. Lamb*, which is the embodiment of the entire English law on the subject.

It may be of interest, in this connection, to study these early American cases and their authority, of which, probably the earliest is that of *Ring v. Wheeler*³ (1827). It is here for the first time in America stated that matter uttered in a judicial proceeding, to be privileged, must be pertinent and relevant to the issue; and, for authority, the court relies on *McMillan v. Birch*⁴ and *Brooks v. Montague*.⁵ The former of these cases was in no sense authority for the proposition. It had reference to words spoken before a presbytery, and not to words uttered in a judicial proceeding. The latter case does, in a *dictum*, support the rule contended for, but the decision really supports the absolute privilege rule, and subsequent English decisions rely on the case to support the latter rule. Why this single English case should have been selected as authority for the principal case when, at this time, there were the cases of *Rex v. Skinner*, *supra*, *Astley v. Younge*, *supra*, and *Lake v. King*, *supra*, with no less authority than Lord Mansfield stating the rule, it is difficult to comprehend. These were all cases of recognized authority, and have so continued since. The principal case was obviously decided without much regard to authority, as the court did not even select the strongest cases supporting its own con-

¹ 127 Mass. 316.

² 83 Fed. 803.

³ 7 Cow. 725.

⁴ 1 Binn. 178 (1806).

⁵ Cro. Jac. 90 (1605).

tention; for at this time *Hodgson v. Scarlett*, *supra*, which, as shown, forms the basis of subsequent American decisions, had been in existence for several years.

*Bradley v. Heath*¹ (decided by Shaw, C. J.), is the next American case supporting the new rule. It was here said: "If the action was used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse." The authority cited for this proposition is *Bromage v. Pressa*² and *Starkie on Slander*.³ The former authority had no relation to a judicial proceeding, but grew out of a communication made on the street concerning the failure of a bank. The text-writer cited supports the absolute privilege unqualifiedly.

Torey v. Field,⁴ another early case, often cited, is scarcely in point, since it was concerning a newspaper publication of a proceeding in chancery. It contains, however, some reference to the matter in question, and seems to agree with the English rule as expressed in *Lake v. King*⁵ and the notes appended to this case. It would be perhaps going too far to say that the principal case supports the absolute privilege, and it would be equally unfair to say that it supports the qualified privilege. It is, nevertheless, often erroneously cited as supporting the latter view, which it does not, for the reason that it does not relate to a similar matter.

*Mower v. Watson*⁶ (decided by the same judge who delivered the opinion in *Tory v. Field*), holds that words spoken by counsel to be privileged must be spoken in the discharge of his duty and be pertinent to the matter in question. The authority relied on consists chiefly of *Torey v. Field*, *supra*, and *Hodgson v. Scarlett*, but resting mainly on the latter authority, which the court regards as setting forth the true English rule, saying: "The rule as it exists in England has been adopted in many of the American States, and we are not informed that any bad results have followed, but we should require that the party claiming the protection of this rule should keep strictly within its limits." The *dictum* in *Hodgson v. Scarlett*, already referred to, is not only the leading authority for this case, but, as we have said before, the original and leading authority for the entire new doctrine. The case of *Brooks v.*

¹ 12 Pick. 163 (1831).

² 4 Barn. & Cres. 247.

³ * 200.

⁴ 10 Vt. 353 (1838).

⁵ 1 Saunders, 120.

⁶ 11 Vt. 536 (1839).

*Montague*¹ perhaps constitutes the primary basis, but it is not so often relied on, and the rule there intimated has never been interpreted in England as in this country.

*Hastings v. Lusk*² found in New York some authority upon which to rest, and further relied on *Hodgson v. Scarlett*, *Brooks v. Montague* and *Badgley v. Hedges*,³ thus leaving the principal case resting on the same authority as previous cases reviewed, except as to the case last cited, which case is directly opposed to the decision.

*Hoar v. Wood*⁴ was the second decision on the subject by Chief Justice Shaw, and is, doubtless, the best American case supporting the new rule, in that it does not rest on precedent alone, but assigns some reason for the rule. The Chief Justice, after speaking of the absolute privilege and its benefits, says:

"Still this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify his private malice by uttering slanderous expressions either against a party, witness, or third person which has no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purpose of justice, to allow counsel full freedom of speech in conducting their causes and advocating and sustaining the rights of their constituents. This freedom of discussion ought not be impaired by numerous and refined distinctions. For these views of law and for a more full discussion of the subject, we refer to the following English and American cases: *Ring v. Wheeler*, *supra*, *Hastings v. Lusk*, *supra*, *Mower v. Watson*, *supra*, *Bradley v. Heath*, *supra*, *Astley v. Younge*, *supra*, *Hodgson v. Scarlett*, *supra*, *Padmore v. Lawrence*,⁵ and *Moulton v. Clapham*." ⁶

Padmore v. Lawrence does not support the principal case; it was clearly a case of the qualified privilege and should not have been cited to support the absolute privilege. *Astley v. Younge* supports the absolute privilege, and is so recognized by all English courts. Why it is cited by the court is difficult to understand, unless it be for the purpose of bearing out the latter part of the above quotation. *Moulton v. Clapham* is a case but meagerly reported; this fact, taken in connection with the very doubtful meaning of the decision, and that March was "a very indifferent reporter," makes the case hardly worthy of recognition. The other authorities cited have been heretofore reviewed.

*Gilbert v. People*⁷ (decided in 1845) rests on the New York cases previously reviewed, *Hodgson v. Scarlett*, and *Thorn v. Blanchard*;⁸

¹ Cro. Jac. 90 (1605).

² 22 Wend. 410 (1839).

³ 1 Penn. 217 (N. J. 1807)

⁴ 3 Met. 193 (1841).

⁵ 11 Ad. & E. 380 (1840).

⁶ March's N. C. 20.

⁷ 1 Denio, 41.

⁸ 5 Johns. 508 (1807).

which latter case is not in point, being a case clearly of the qualified privilege class.

White v. Nichols,¹ is the only case in which the United States Supreme Court has in any manner expressed an opinion on the subject. The part of the opinion relating to this question is *obiter*, the case being one concerning statements in letters to officials at Washington requesting the removal of an obnoxious collector of customs. Mr. Justice Daniels, in delivering the opinion, saw fit, however, extrajudicially, to lay down a rule regarding communications in judicial proceedings. The court supports the *dictum* by citing *Hodgson v. Scarlett* and *Johnson v. Evans*.² As an example of the support obtained from the latter case, we quote from the opinion of Lord Eldon therein as follows: "Words used in the course of a legal or judicial proceeding, however hard they might bear on the party of whom they were used, are not such as would support an action for slander." The principal case is seldom cited as authority in this country, and judging from the criticisms of it in *Shelfer v. Gooding*³ and *Johnson v. Brown*,⁴ the refusal to cite it is justifiable.

V.

The foregoing list of authorities, constitutes the primary foundation in America for the new rule. Subsequent American cases rest almost exclusively on these, or others growing out of these, with the result that the rule as it now stands recognizes American precedent entirely. We might say here also that the rule as it now stands is a considerable enlargement of the earlier rules; the continued application of it having had a tendency to broaden it. The rule, however, is in existence, and it is now a question whether or not it is justifiable, and whether or not the beginning of it is properly found in precedent. If it is truly founded in precedent, it has cause for its existence, and the highest consideration should be paid to it. But if not justified by precedent, the continued application of the rule is improper, unless it be supported by the sound reason; and if supported by neither reason nor precedent, the last and only excuse for its existence and continuance must rest on the principle that "whatever is, is right."

The review of authorities just completed shows beyond question that the earlier American cases had their foundation in supposed English precedent, and practically without reference to reason. But, as shown,

¹ 3 Howard, 266, 288 (1845).

² 3 Esp. 32 (1799).

³ 2 Jones (N. C. Law), 181.

⁴ 13 W. Va. 124.

English precedent is clearly *contra*, as admitted by the late American decisions.

A complete review of all the English cases from the earliest times to the present date will show beyond dispute that the absolute privilege has always been maintained, and it is impossible to find a case wherein the relevancy and pertinency of the matter has been inquired into with a view to deciding the case according to the result of the inquiry. By the interpretation of the rule we are best able to understand what that rule is: In England the interpretation has always been for the absolute privilege in unqualified terms, as will be seen by reading *Munster v. Lamb*, *supra*, and *Dawkins v. Lord Rokeby*, *supra*. And in the English colonies the interpretation has been the same, even before the date of these two last decisions.¹

A careful examination of the English authorities destroys the foundation of the new doctrine, at least so far as precedent is concerned, and while courts have been trying laboriously to get from under this imputation upon the rule, and at the same time uphold the new doctrine, the result has been judicial perplexities from which it is almost impossible to formulate any reasonable principle. The consequence is that nearly every case in which it is attempted to apply the new rule, is not only most vigorously litigated, but is often ended by the decision of a divided court. The several courts of the States, as said before, are in great conflict. While one jurisdiction has supported the new rule, another has clung to the old English doctrine with able reasoning.

In this connection it may not be out of place to again enumerate a few of those cases supporting the English rule, of which probably the best is that of *Runge v. Franklin*.² Others worthy of mentioning again are *Goslin v. Cannon*,³ *Harstock v. Reddick*,⁴ *Bartlett v. Crist-hilft*,⁵ *Hunckel v. Voneiff*⁶ and *Johnson v. Brown*;⁷ the last, in a measure, supporting the qualified privilege, but of special interest for the very learned opinion of Judge Green. Of the text-writers, it may be said that the older ones support the absolute privilege, the later adopt the new rule, but only in the sense of laying down the law as it is administered.

¹ *Queen-Empress v. Ba-ba-ji*, Indian Law Rep., Bombay Series, Vol. 17, p. 127 (1892); *Hinde v. Baudry*, Indian Law Rep., 2 Madras Series, 13 (1876); *Manjaya v. Seshe Shetti*, 1 Indian Law Rep., 11 M ras, 477.

² 72 Tex. 585.

³ 1 Harrington, 3.

⁴ 6 Blackf. 258.

⁵ 69 Md. 219.

⁶ 69 Md. 179.

⁷ 13 W. Va. 124.

VI.

Whether or not the rule is justly founded in precedent we leave the reader to decide, always bearing in mind "the natural disposition of men to follow others (whereby) erroneous precedents are too frequently followed," thus establishing a line of authorities based on error. "Reason is the life of the law," a maxim often the cause of the overthrow of precedent, but where precedent travels two different roads with a tinge of reason for each, it then becomes a question of the better reasoning.

It is within the power of the court to punish as for contempt, any unseemly conduct—counsel may be controlled in their speech; witnesses may be rebuked, and a motion will lie to strike out irrelevant matter, while prosecution for perjury is another remedy. Conceding that these powers are always exercised, after which no other recourse lies for the injured party, it then becomes a question whether or not a greater sacrifice has been made by the abandonment of a private right than would have been made had the summary action of the court been dispensed with, and the slandered party permitted to entertain an action for the irrelevant and objectionable words.

In the application of the new rule the courts have seen fit to make an exception as to judges; in other words, they have followed the English law in this particular. Public policy demands the protection of a judge even though he exercise his position for the avowed purpose of maligning the character of a party before him. There is no recourse for the injured party, and very justly so. But why give the judge a greater right than the witness? Both should be governed by the same principle of law; that is, absolute freedom of speech. It is urged that if the judge were obliged to utter only that which is relevant, an action against him might arise out of every lawsuit tried before him; it might deter the judge from speaking freely and otherwise hamper him in his judicial functions.

The same argument may be made, and with even greater reason, in behalf of witnesses and counsel. The immunity granted to the judge alone, discloses the weakness of the new doctrine. It is admitted that the judge must have this security to guarantee freedom of action; and while extending this freedom to judges, who are supposed to be men learned in the law, and in no way influenced by the excitement of the cause, yet the rule in question confines those directly involved in the action to the narrowest limits, and requires of them greater judicial

discretion than is required of the judge himself. As between the judge and a witness, the offense of the former is far greater; there is less excuse for it, and his deliberate expressions are certainly more apt to be the result of malice than could possibly be the act of the unskilled and badgered witness.

The maxim "*ubi jus ibi remedium*," has been often urged in support of the new doctrine to the entire exclusion of "*salus populi suprema lex*," as well as the maxim "the law will rather suffer a private mischief than a public inconvenience." It is not an uncommon occurrence for courts to overlook the latter maxims in favor of the former, especially where the probable injury to the rights of the public are not clearly defined; or where there is an attempt to draw a line of demarkation as to what will and what will not amount to a public injury. The subject under discussion will permit the line to be drawn in but one place. The nicety of distinction as to what is and what is not relevant under the new rule, makes it unquestionably an inconvenience if not a positive injury; the only place where the line can be drawn with safety is, in support of the *absolute privilege*. Any infringement on the absolute privilege rule is, in effect, as impolitic as a total abolition of that rule. The security of the absolute privilege lies in its certainty of protection. Destroy that, in whole or part, and the entire field of litigation is thrown open.

The entertaining of the action means the review of the entire original case, and that, too, perhaps, before a different court, at a subsequent period of months or even years, and under circumstances most unjust to the defendant. It must be remembered that the English rule is not made to protect the evil-disposed, nor to encourage malice. It is made to shield the truthful witness and fearless counsel; to insure and hold out to them a guarantee of protection, and to encourage that "vigorous, healthy feeling of legal right" so necessary to good citizenship.

The success of a principle of law in its justness is often to be judged from the results. And were it possible to arrive at some definite conclusion as to what proportion of actions brought in jurisdictions sustaining the new doctrine were successful, it might then be possible to say with some degree of certainty whether or not the results are favorable. But this is impossible, for the reason that the greater portion of these actions never reach the higher courts; but of those that do reach the higher courts in those jurisdictions favoring the new doctrine, more than seventy-five *per centum* fail. Of this percentage

the greater number fail for the reason that the objectionable matter was pertinent and relevant. This data does not aid us much, for while we have seen the possible justification of asserting the individual right, we have no means of estimating the probable injury and inconvenience wrought by the new rule. Whether or not the rights of witnesses, counsel and parties are in any manner molested by toleration of the new rule is a matter of speculation. But if the frequency of litigation can be regarded as an indication of the evil effects on the public, then the injury must indeed be great; for in those jurisdictions entertaining the new doctrine, reported cases on privileged communications in judicial proceedings are numerous, to say nothing of those that fail to reach the higher courts; while in jurisdictions following the English rule, one or two reported cases usually settle the matter. If England, in the beginning, followed the present American rule, as some authorities insist, then the evil results of that rule have been discovered, for in *Munster v. Lamb*, *supra*, the question is put at rest in no uncertain language; but as shown a critical examination of the English rule from *Beauchamps v. Croft* (1569) to *Munster v. Lamb* (1883), will show a continuous refusal to entertain such actions, with now and then hints as to the necessity of the matter being pertinent and relevant.

The so-called American doctrine, founded as it is in supposed English precedent, seems really to be nothing more nor less than the result of misinterpretation.

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WHEN RIGHTS IN PERSONAM GIVE RISE TO RIGHTS IN REM.

The third grand division of rights, according to Mr. Holland, is rights *in personam* and rights *in rem*, or rights of a definite, and of an indefinite kind.¹

Rights *in personam* and rights *in rem* have been defined as, respectively, contract right, and tort right. Then it would seem to follow that rights *in personam* give rise to rights *in rem* so far as "torts are founded on contract." For instance, when a plaintiff has a contract with a definite person, say a physician for skillful attention, this would

¹ Holland's Jurisprudence, 107.